

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA J. FIELDS,

Defendant-Appellant.

UNPUBLISHED

January 12, 2012

No. 301385

Muskegon Circuit Court

LC No. 10-054902-FH

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b). The trial court sentenced defendant to 40 days in jail with credit for one day, and 36 months' probation. We affirm.

Defendant worked as a massage therapist for Nail Care Studio. On November 3, 2009, the victim came to the studio to receive a massage. The victim testified that during the course of the massage, defendant, without warning or the victim's permission, pulled down her underwear and briefly rubbed her upper genital area; he also touched her left breast. The victim told defendant that what he had done was inappropriate, and defendant apologized. Thereafter, the victim paid for the massage and left the studio. The victim reported the incident to the police on November 9, 2009. During their investigation, the police recorded a telephone conversation between the victim and defendant in which defendant admitted that he was attracted to the victim and apologized for his "inappropriate" behavior. Defendant said that he was "very ashamed." At trial, the jury listened to the recorded telephone call. The prosecution charged defendant with two separate counts of CSC IV: Count I, touching the victim's genital area; Count II, touching the victim's left breast. The jury found defendant guilty of Count I, but not guilty of Count II.

Defendant first argues that the trial court committed error requiring reversal by failing to give the jury a specific unanimity instruction. We disagree. Defendant did not preserve this issue for appeal because he did not request a specific unanimity instruction or object to the trial court's instruction based on the lack of a specific unanimity instruction. *People v Gadomski*, 232 Mich App 24, 29-30; 592 NW2d 75 (1998). We review this unpreserved claim for plain error affecting a defendant's substantial rights. *People v Grayer*, 252 Mich App 349, 352; 651 NW2d 818 (2002).

To convict defendant of CSC IV, the prosecution was required to prove that defendant used force or coercion to accomplish the sexual contact. MCL 750.520e(1)(b). The statute lists alternative circumstances that constitute force or coercion. MCL 750.520e(1)(b)(i) through (v). The prosecution argued the evidence showed two forms of force or coercion: that defendant achieved the sexual contact in a manner or for a purpose that was medically unethical *or* by the element of surprise. MCL 750.520e(1)(b)(iv) and (v). Defendant argues on appeal that the trial court was required to give a specific unanimity instruction that instructed the jury that it must unanimously agree on at least one of the prosecution's two theories of force or coercion.

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to a unanimous verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994); US Const, Am VI; Const 1963, art 1, § 14. "In order to protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement." *Cooks*, 446 Mich at 511. Typically, the trial court may fulfill this duty through a general instruction on unanimity. *Id.* However, a specific unanimity instruction may be necessary in cases where the prosecution "offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense." *Cooks*, 446 Mich at 512, 530; see also *Gadomski*, 232 Mich App at 30. For instance, in both *People v Yarger*, 193 Mich App 532, 534; 485 NW2d 119 (1992), and *People v Pottruff*, 116 Mich App 367, 369-370; 323 NW2d 402 (1982), the prosecution charged the respective defendant with one count of CSC, but supported its charge with evidence of multiple different acts of sexual contact. In both cases, this Court found that the trial court's general instruction on unanimity did not sufficiently protect the respective defendant's right to a unanimous jury verdict because the jurors may have relied on different acts of sexual contact in finding the requisite actus reus of the charged offense. *Yarger*, 193 Mich App at 536-537; *Pottruff*, 116 Mich App at 375; see also *Cooks*, 446 Mich at 525, 527.

In the present case, unlike *Yarger* or *Pottruff*, the prosecution did not offer evidence of multiple acts of sexual contact by defendant in order to prove the actus reus of a single count of CSC. While the prosecution offered evidence that defendant committed two different acts of sexual contact, it separated these two acts into two distinct charges: Count I, touching the genital area, and Count II, touching the left breast. By separating the two alleged acts of sexual contact into two separate charges and instructing the jury accordingly, the trial court precluded the danger that a guilty verdict on Count I would not be based on a unanimous finding that defendant committed the actus reus of touching the victim's genital area. See *Pottruff*, 116 Mich App at 375-376 (noting that "this problem [of a non-unanimous jury verdict] can be avoided on retrial either *by charging defendant with separate counts*" of CSC I or by giving a specific unanimity instruction (emphasis added)).

Further, defendant bases his argument on the prosecution's use of multiple theories of force or coercion. But the prosecution's use of multiple theories does not require a specific unanimity instruction. "[I]t is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *Gadomski*, 232 Mich App at 31. Accordingly, defendant fails to show that the trial court committed a plain error by not providing the jury a specific unanimity instruction.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. Defendant did not preserve this issue for appeal because he did not move the trial court for a new trial on the basis of ineffective assistance of counsel, and the court did not hold a *Ginther*¹ hearing. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). We review defendant's unpreserved ineffective assistance of counsel claim for plain errors apparent in the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed, "and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that . . . but for the error, the result of the proceedings would have been different . . ." *Id.* .

In this case, defendant argues that his defense counsel was ineffective because he failed to call defendant as a witness. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Without an evidentiary record regarding defense counsel's reasons for not calling defendant as a witness, defendant cannot overcome the strong presumption that counsel's action constituted sound trial strategy under the circumstances. *Id.* at 76; see *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Moreover, while defendant contends that he would have testified that he did not engage in sexual contact with the victim, defense counsel presented this argument to the jury even without defendant's testimony. Therefore, defendant fails to show that counsel's alleged error in failing to call defendant as a witness prejudiced defendant by denying him a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Finally, defendant argues that the prosecution presented insufficient evidence to support his conviction. We disagree. We review de novo this claim to determine if the evidence, when viewed in a light most favorable to the prosecution, would permit a rational trier of fact to find that all essential elements of the crime were proved beyond a reasonable doubt. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

In this case, defendant argues that this Court should reverse his conviction because the victim's testimony was not credible and, thus, was insufficient to support his conviction. Defendant's argument lacks merit. This Court "must not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Drohan*, 264 Mich App 77, 88; 689 NW2d 750 (2004). Moreover, the testimony of a CSC victim need not be corroborated to sustain a conviction. *Id.* at 89; MCL 750.520h. Nevertheless, the victim's testimony was corroborated by many of the statements defendant made during the recorded telephone call. "[W]hen reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict." *Solmonson*, 261 Mich App at 661. Accordingly, viewing the evidence in the light most favorable

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

to the prosecution, it is clear that the prosecution presented sufficient evidence to support a rational jury's finding that the elements of CSC IV were established beyond a reasonable doubt.

We affirm.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Stephen L. Borrello